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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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MIMEDX GROUP, INC. and SEAN MCCORMACK,

Plaintiffs,

-against-

SPARROW FUND MANAGEMENT LP, A/K/A "AURELIUS VALUE"; VICEROY RESEARCH; JOHN FICHTHORN; BR DIALECTIC CAPITAL MANAGEMENT, LLC; AND DOES 1-10, INCLUSIVE,

Defendants.
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REPORT & RECOMMENDATION

17-CV-07568 (PGG) (KHP)

TO: HONORABLE PAUL G. GARDEPHE, UNITED STATES DISTRICT JUDGE

FROM: KATHARINE H. PARKER, UNITED STATES MAGISTRATE JUDGE

Plaintiffs MiMedx Group, Inc. ("MiMedx") and Sean McCormack bring this action against Defendants Sparrow Fund Management LP ("Sparrow"), a/k/a "Aurelius Value," John Fichthorn, BR Dialectic Capital Management, LLC ("BR Dialectic"), Viceroy Research ("Viceroy"), and Does 1-10 asserting claims of defamation, false light and tortious interference with business relations. The claims against Sparrow arise from statements made online by "Aurelius Value" that allegedly were false, misleading and defamatory about MiMedx. Plaintiffs believe Defendant Sparrow is the author of the website "Aurelius Value." The claims against Viceroy arise from statements made online and in Tweets by Viceroy that allegedly were false, misleading and defamatory about MiMedx and McCormack. Plaintiffs do not know who the author of Viceroy is and have moved for emergency discovery from Defendants Sparrow, Fichthorn and BR Dialectic to identify Viceroy so that it can be served with a copy of the

Complaint in this matter (Docket No. 14). Finally, the claims against Fichthorn and BR Dialectic arise from allegedly defamatory statements about MiMedx made by Defendant Fichthorn to a major shareholder of MiMedx who sold his stock after the conversation with Fichthorn.

Defendant Sparrow denies knowledge of the identity of Viceroy and, thus, opposes the motion for expedited discovery. Ficthorn and BR Dialectic also oppose expedited discovery and deny sufficient knowledge of Viceroy to allow Plaintiffs to effectuate service of process. Defendants Sparrow, Ficthorn and BR Dialectic also have moved to dismiss the Complaint as against them (Docket Nos. 33 and 38).

For the reasons set forth below, this Court recommends that the Motions to Dismiss be GRANTED and that the Motion for Expedited Discovery be GRANTED in part and DENIED in part.

BACKGROUND

MiMedx is a publicly traded company that manufactures and sells biomaterial medical products. It claims that its stock has been wrongfully manipulated by short sellers who are defaming it on the internet, causing substantial loss to the company and its shareholders. McCormack is an employee of MiMedx who claims he also has been defamed on the internet and, as a result, suffered reputational harm.

Sparrow is a hedge fund manager and/or investment advisory firm that Plaintiffs claim operates a website under the pseudonym "Aurelius Value" on which it publishes research about publicly-traded companies in which it has a financial interest, and specifically short positions. Sparrow denies that it operates "Aurelius Value."

According to Plaintiffs, Viceroy is an individual who operates a blog and Twitter account on which he publishes research about publicly-traded companies in which he has a financial interest, and specifically short positions. Plaintiffs do not know the name of the individual who runs Viceroy because the blog does not provide the identity of the author or any contact information.

BR Dialectic Capital Management is a registered investment advisor that assists clients with stock selection in the short portfolio. It is owned by Defendant Fichthorn. BR Dialectic has an interest in short-selling MiMedx stock.

According to MiMedx, on or about September 15, 2017, **Fichthorn and BR Dialectic** defamed MiMedx by telling a major MiMedx shareholder that MiMedx was engaged in fraudulent channel stuffing, stating that "this is definitely a revenue fraud situation" that would "end up with some MiMedx employees being dragged away in handcuffs" and that it "could be a jailable offense for the CEO." According to MiMedx, during the call, Fichthorn stated that "in December 2015 MiMedx stuffed over $10 million" of product, that certain MiMedx employees instructed others "to stuff channel in 12/15," and that one of MiMedx's former employees has a list of "120 [other] former employees" with knowledge of channel stuffing. Fichthorn allegedly represented to the shareholder that he "talked to lots of Texas and Florida distributors who stuff product for MiMedx." MiMedx also claims that during the course of the call, Fichthorn made several other false statements to the shareholder, including that someone by the name of Bill McLaughlin is a paid consultant of MiMedx who has six different business cards, that a company called Fuse Medical is a public distributor of MiMedx that is paying doctors in Fuse stock, and that forty doctors have shares in MiMedx and, thus, conflicts of interest. Finally, MiMedx claims that Fichthorn suggested to the shareholder that his knowledge was gained from the "founder" of a "local Atlanta law firm" whom he did not name. According to MiMedx, Fichthorn's goal was to cause the shareholder to sell his stock so that he and BR Dialectic could profit from their short positions. MiMedx states that the shareholder in fact sold approximately one million shares after the call, causing the share price to drop.

MiMedx also asserts that on or about September 20, 2017, an unknown author hiding behind the pseudonym **"Aurelius Value"** published a false and defamatory article about MiMedx, also accusing MiMedx of channel stuffing, stating the accusations were corroborated by a former sales employee. The article identified certain distributors of MiMedx and implied that MiMedx used suspicious, small distributors to engage in channel stuffing and/or that presented "channel stuffing and kickback risks." The article contained other allegedly false or misleading information including that MiMedx had an undisclosed agreement with another company to sell MiMedx products under its own trademark and that MiMedx sells products through physician-owned distributors. According to MiMedx, the article also misled readers as to a communication between a MiMedx consultant and "an investigator from another investor" insofar as it omitted the consultant's statements that were supportive of MiMedx and refuted allegations of channel stuffing. MiMedx claims, "[u]pon information and belief, Aurelius Value is actually one or more of Sparrow's partners or employees." (Doc. No. 1, Complaint ("Compl.") ¶ 36.)

Finally, MiMedx and Plaintiff McCormack assert that since on or about September 20, 2017, **Viceroy** has published a number of articles and Tweets defaming them. Among other things, they assert that Viceroy said the following false things:

- MiMedx hired employees from another company who had engaged in a kickback/bribery scheme at their former company;
- MiMedx hired Plaintiff McCormack because it knew of his history of involvement in kickback and bribery schemes at a former employer, stating that McCormack was an "instrumental figure" in the alleged kickback scheme at his former company, causing that company to incur substantial legal costs and dubbing McCormack the "$350-million-dollar-man";
- McCormack "stood accused" of being involved in the kickback and bribery scheme and was "named" as a "key influence" in the scheme, as well as suggesting that McCormack "made false or fraudulent claims" for medical products and services to Medicare, Medicaid, and TRICARE programs from July 2008 to January 2011;
- "our findings on Sean McCormack show a historic pattern of behavior that has proven costly to the businesses he has been employed in";
- It had "found evidence supporting [channel stuffing allegations] in MiMedx's financial accounts" including an increase of expenses in sales staff that did "not correlate with specified increases in headcount and channel check wages by a factor of two";
- "[a]llegations . . . suggest that a substantial portion of Selling General & Administrative growth is attributable to kickbacks and 'sales incentives' given to VA doctors and medical supply procurement officers";
- It had "serious reservations as to whether MiMedx properly disclosed its employees' connections" with a company that had settled;
- There were pricing irregularities in invoices between MiMedx and a company called AvKARE that were an "attempt to conceal or draw attention away from [MiMedx's] purchase orders", and "bypass manual internal control checks at VA hospitals", and that "we anticipate the VA will take action against MiMedx on the back of evidence contained in this report";
- That MiMedx failed to "formally announce to the market that they are a subject of an SEC investigation";
- MiMedx failed to remediate a "material weakness in internal controls," rendering it an "audit risk"; and
- Suggesting that two lawsuits created concern about MiMedx and its CEO and impacted its value to investors.

(Compl. ¶¶ 49-75.)

MiMedx and McCormack also take issue with Viceroy suggesting that MiMedx should have disclosed McCormack's purported past wrongdoing to MiMedx investors through the following statements, "[w]hile the case [involving McCormack's former company] was settled and implies no admission of guilt we question why MiMedx has not disclosed [McCormack's] employment to investors," and "McCormack's position at the company and past are a fact [sic] MiMedx would like to keep to themselves." They state that McCormack was not involved in any wrongdoing or case with his prior company and thus not involved with any settlement. They also take issue with Viceroy's suggestion that MiMedx violated certain compliance requirements as a government contractor by failing to disclose that it had hired employees (including McCormack) from a company that had settled a lawsuit involving an alleged bribery and kickback scheme and by backdating a certification.

MiMedx claims that the Defendants conspired together to adversely manipulate its stock price via all of the aforementioned statements. The factual bases for the alleged conspiracy are that:

- the false allegations "closely track one another and in some instances are almost identical," (Compl. ¶¶ 78-80); and
- "Viceroy and Aurelius both engaged in self-promotion and cross-promotional efforts online via" Twitter, (Compl. ¶ 81).

MiMedx asserts claims of libel against Sparrow, Viceroy and all Doe Defendants, claims of slander against Dialectic, Fichthorn and all Doe Defendants, and claims of defamation, false light and tortious interference with business relations against all Defendants. McCormack asserts claims of libel and defamation against Viceroy and all Doe Defendants.

Sparrow Fund Management denies involvement in any of the alleged misconduct and claims it has been incorrectly named in this suit. It has submitted an affidavit from Nathan Koppikar, its Director of Research, stating that "Sparrow did not make any of the statements attributed to it in the complaint," that he has "not posted, or directed, or caused any writing to be posted under the anonymous username 'Aurelius Value,'" that "[n]o Sparrow partner or employee has posted, or has directed, or has caused any writing to be posted under the anonymous username 'Aurelius Value,'" and that he does "not know the identity of the individual or individuals who have posted under the anonymous username 'Viceroy Research.'" (Doc. No. 35-1 ¶¶ 6-10.) At oral argument before this Court, Sparrow's counsel offered to provide a similar affidavit from every Sparrow employee stating the same thing. For this reason, it seeks dismissal of the claims against it on the grounds that MiMedx has an insufficient factual basis to state a claim against it.

Fichthorn and BR Dialectic do not deny the statements attributed to them (given that they must be taken as true for purposes of a motion to dismiss), but argue that MiMedx fails to state claims for defamation, slander, false light and tortious interference with business relations as a matter of law.

LEGAL STANDARD

In considering a Rule 12(b)(6) motion, the Court must accept as true all factual allegations set forth in the complaint and draw all reasonable inferences in favor of the plaintiff. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002). The plaintiff need only plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S.

544, 570 (2007). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

The Court may not consider affidavits and other evidence not otherwise incorporated by reference in the complaint when determining a motion to dismiss. Fed. R. Civ. P. 12(d); *Conradt v. NBC Universal, Inc.*, 536 F. Supp.2d 380, 388 (S.D.N.Y. 2008).

DISCUSSION

1. Sparrow Fund Management's Motion To Dismiss

Sparrow seeks dismissal of MiMedx's claims against it because it does not do business or operate under the anonymous blogger name "Aurelius Value" and the complaint fails to state sufficient facts rendering it plausible that Sparrow engaged in any of the alleged misconduct.

It is well established that a complaint cannot survive a motion to dismiss if "it tenders naked assertions devoid of further factual enhancement." *Ashcroft*, 556 U.S. at 678 (2009) (internal quotation marks and citations omitted). In the Second Circuit, there are limited circumstances where claims based on information and belief can survive a motion to dismiss. These include where the facts are solely within the possession and control of the defendant or where the allegation is "based on factual information that makes the inference of culpability plausible." *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010). In cases where a plaintiff claims that the defendant uses an alias, courts require factual support for the asserted connection between the alias and the defendant. *Thompson v. KeyBank USA N.A.* applies a similar logic. No. 09-cv-4054 (DRH)(AKT), 2010 WL 4961674 (E.D.N.Y. Dec. 1, 2010) (dismissing claim that defendant was using a false name to "indicate that a third person is collecting or attempting to collect . . . debts" on defendant's behalf because "[n]o specific facts [we]re alleged to support this assertion").

Here, Plaintiffs offer no factual support whatsoever for their belief that Sparrow is Aurelius Value. Nor have they offered any factual basis for their belief that Sparrow knows the identity of persons responsible for publishing Aurelius Value. For example, Plaintiffs do not assert that they have any person or informant that has stated there is a connection between the two entities. They do not assert that they have any forensic research connecting the internet address of Aurelius Value to Sparrow or any Sparrow employee. They do not identify in the Complaint any particular employee of Sparrow that is known to blog about MiMedx and reference postings by Aurelius Value. Moreover, as recently as November 2017, after the Complaint against Sparrow was filed, MiMedx conceded that it does not know the true identity of Aurelius Value and "is still in the process of perfecting its case against . . . two hidden entities." (Doc. No. 56, Crisp Decl., Ex. B (Ltr. from P. Petit to B. Fields (Nov. 1, 2017)) & Ex C (MiMedx Press Release (Nov. 8, 2017)).)[1] The Court also notes that at least one other court has

[1] Although these exhibits are not part of the complaint, Federal Rule of Evidence 201(b) permits a court to take judicial notice of facts that are "not subject to reasonable dispute," Fed. R. Evid. 201(b), and courts in the Second Circuit routinely do so at the motion to dismiss stage. *See, e.g.*, *Quick Cash of Westchester Ave. LLC v. Vill. of Port Chester*, No. 11-cv-5608, 2013 WL 135216, at *4 (S.D.N.Y. Jan. 10, 2013) (taking judicial notice of public documents on the internet and stating "it is well established that courts may take judicial notice of publicly available documents on a motion to dismiss" (internal citations omitted)); *Cunningham v. Cornell Univ.*, No. 16-cv-6525 (PKC), 2017 WL 4358769, at *4 (S.D.N.Y. Sept. 29, 2017) ("Courts may [ ] take judicial notice of information contained on websites where the authenticity of the site has not been questioned." (internal quotation marks and citations omitted)).

rejected an attempt to unmask Aurelius Value, suggesting that MiMedx really has no idea who is running Aurelius Value. *See Aurelius v. BofI Fed. Bank*, No. MC 16-71 DSF (FFM), 2016 WL 8925145, at *3-6 (C.D. Cal. Sept. 20, 2016) (granting motion to quash and holding that "innuendo" and allegations of coordination based on the "timing" of certain events and statements, without more, did not justify BofI's attempt to unmask Aurelius).

J'accuse is not enough to satisfy the pleading standard under *Iqbal*. Plaintiffs have failed to provide a sufficient factual basis to render it plausible that Sparrow is responsible for the conduct of Aurelius Value. Thus, all the claims against Sparrow must be dismissed. However, dismissal should be without prejudice in the event Plaintiffs have or can in the future plead sufficient facts to plausibly support Sparrow's involvement in the alleged wrongdoing and that Sparrow is Aurelius Value.

2. Fichthorn And BR Dialectic's Motion To Dismiss

Fichthorn and BR Dialectic contend that Plaintiffs have failed to state any viable claims against them. The Court addresses the slander and defamation allegations first, and then addresses the claims for false light and tortious interference with business relations.

A. Defamation And Slander

Black's Law Dictionary states that "Defamation" is "[m]alicious or groundless harm to the reputation or good name of another by the making of a false statement to a third person." Defamation consists of the twin torts of libel and slander. *Albert v. Loksen*, 239 F.3d 256, 265 (2d Cir. 2001). Libel is written defamation, whereas slander is oral defamation. For defamation to be actionable, a plaintiff must prove that the defendant made a false and defamatory statement of fact about the plaintiff to a third party, not otherwise protected by privilege, causing special harm or constituting slander *per se*.[2] *Id.* at 265-66.

When the plaintiff is a public figure, such as a public company, the plaintiff must demonstrate that the defendant acted with "actual malice" in connection with the defamatory statements. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *see also Reliance Insurance Co. v. Barron's*, 442 F. Supp. 1341, 1346 (S.D.N.Y. 1977) (public company found to be public figure). At the motion to dismiss stage, the pleading of "actual malice" must be plausible and supported by factual allegations. *Biro v. Conde Nast*, 963 F. Supp. 2d 255, 278-79 (S.D.N.Y. 2013).

Statements of opinion are never actionable. *Celle v. Filipinio Reporter Enters Inc.*, 209 F.3d 163 (2d Cir. 2000); *DG & A Mgmt. Servs., LLC v. Sec. Indus. Ass'n Compliance & Legal Div.*, 859 N.Y.S.2d 305, 307 (3d Dep't 2008) (statements that are "merely reflective of [a defendant's] unfavorable opinion" do not amount to slander *per se*). It also is well established that "[l]oose, figurative or hyperbolic statements, even if deprecating the plaintiff, are not actionable." *Dillon v. City of New York*, 704 N.Y.S.2d 1, 5 (1st Dept. 1999). Whether a particular statement expresses fact or opinion is a question of law for the court. *Steinhilber v. Alphonse*, 501 N.E.2d 550, 553 (N.Y. 1986). When assessing a statement to determine whether it is fact or opinion, the court must look at the content of the communication as a whole, its tone and apparent purpose. *Immuno AG v. Moor-Jankowski*, 567 N.E.2d 1270, 1281 (N.Y. 1991). In making its assessment, the court considers four factors: "(1) whether the statement at issue has a precise meaning so as to give rise to clear factual implications, (2) the degree to which the statements are verifiable, *i.e.*, objectively capable of proof or disproof, (3) whether the full context of the communication in which the statement appears signals to the reader its nature as opinion, and (4) whether the broader context of the communication so signals the reader." *Sandals Resorts Intern. Ltd. v. Google, Inc.,* 86 A.D.3d 32, 39–40 (1st Dep't 2011) (internal quotation marks and citations omitted).

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[2] Defamation *per se* is when a statement "affect[s] a person in his or her profession by imputing to him or her any kind of fraud, dishonesty, misconduct, incapacity, unfitness, or want of any necessary qualification in the exercise of one's profession." *Jean- Joseph v. Walgreens, Inc.*, No. 10-cv-4635 (SLT)(VVP), 2011 WL 5025266, at *4 (E.D.N.Y. Oct. 21, 2011) (citing *Ram v. Moritt*, 205 A.D.2d 516, 517 (1994)). Statements which allege that a person has engaged in illegal activity constitute defamation *per se*. *Geraci v. Probst*, 938 N.E.2d 917, 922 (N.Y. 2010).

A review of the alleged statements made by Fichthorn demonstrate that they are opinions and predictions—not statements of fact. They were made in the course of a one-on-one conversation between two sophisticated investors, one an investment advisor and known short-seller, and the other a person who owned at least one million shares of MiMedx. The context of the conversation, as described by MiMedx, concerned allegations leveled by MiMedx's former employees in a lawsuit against MiMedx—a public company—and included Fichthorn's opinions about the allegations and predictions about possible outcomes of the investigation and claims. MiMedx's focus on Fichthorn's alleged statements regarding the possibility of criminal liability does not advance its claim of defamation in the context of the conversation. For example, to the extent "Fichthorn represented to the shareholder with no hesitation that 'this is definitely a revenue fraud situation,' that the practices he described 'could be a jailable offense for the CEO,' and that 'this situation will end up with some MiMedx employees being dragged away in handcuffs,'" (Compl. ¶ 25), such isolated statements are exactly the type of "loose, figurative or hyperbolic statements, [that], even if deprecating the plaintiff, are not actionable." *Dillon,* 704 N.Y.S.2d at 5; *see also Jacobus v. Trump*, 51 N.Y.S.3d 330, 336 (N.Y. Sup. Ct. Jan. 9, 2017); *Adelson v. Harris*, 973 F. Supp. 2d 467, 487-88 (S.D.N.Y. 2013). Any reasonable person listening to such hyperbolic language would realize that Fichthorn had no way of predicting future events (such as the hypothetical arrests of MiMedx employees), and that Fichthorn's alleged language (this "***could*** be a jailable offense") expressed conditional possibility, not factual certainty. *Immuno AG v. Moor-Jankowski*, 549 N.E.2d 129, 134 (N.Y. 1989), *reaffirmed after remand by* 567 N.E.2d 1270 (1991) ("Speculations as to the . . . potential future consequences of proposed conduct generally are not readily verifiable, and are therefore intrinsically unsuited as a foundation for libel.").

Other alleged comments, including that the company's investigation into the "channel stuffing" allegations was "biased," "inadequate," and "tainted," (Compl. ¶¶ 32-33), are inherently unverifiable expressions of opinion. *Adelson v. Harris*, 774 F.3d 803, 807 (2d Cir. 2014) ("[C]haracterization of Adelson's money as 'dirty' and 'tainted' is the sort of . . . unfalsifiable opinion protected by the First Amendment.").

Indeed, New York courts have found that statements of the type Fichthorn is accused of making concerning a public company are pure opinion and not actionable. *See, e.g., Nanoviricides v. Seeking Alpha*, No. 151908/2014, 2014 WL 2930753 at *1 (N.Y. Sup. Ct. N.Y. Cty. June 26, 2014) (denying pre-complaint discovery, article containing negative statements about public company was "pure opinion"); *Silvercorp Metals Inc. v. Anthion Mgmt. LLC*, 23 Misc.3d 1231(a), 2012 WL 3569952, at *1 (N.Y. Sup. Ct. N.Y. Cty. Aug. 16, 2012) (allegedly defamatory statements made as part of scheme to drive down stock price and profit from short positions were deemed to be nonactionable expressions of opinion; rejecting early discovery); *Deer Consumer Prods, Inc. v. Little Grp.*, No. 650823/2011, 2012 WL 5983641, at *1 (N.Y. Sup. Ct. N.Y. Cty. Nov. 29, 2012) (same); *BofI Fed. Bank v. Seeking Alpha, Inc.*, (S.D.N.Y Feb. 9, 2016) (16-MC-00025), 2016 WL 3145860 (short seller's post involved "core noncommercial speech" and "clearly involves speech on matters of public interest" and was not actionable defamation); *Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 443 (S.D.N.Y. 2014) (speech with some commercial aspects is not "commercial speech" when the statements "relate to matters of public concern and do not themselves propose transactions"). *Cf. Fotochrome, Inc. v. New York Herald Tribune, Inc.*, 305 N.Y.S.2d 168, 170–72 (N.Y. Sup. Ct. 1969) (reasoning that defamation law cannot be used to deter "would-be critics" from voicing their criticism as there is "a need for information concerning, the stock market in general or the successes, failures or manipulations of specific corporations in which thousands of people have invested their personal fortunes").

To the extent that MiMedx claims it has been defamed by implication or defamed because the claimed opinions rest upon undisclosed facts, it is also mistaken. MiMedx's Complaint expressly alleges that "Fichthorn's talking points" were "drawn from" former employees' allegations in various court pleadings alleging "that MiMedx fired them in retaliation for complaints about the company's purported business practices, including alleged 'channel stuffing.'" (Compl. ¶¶ 5, 25.) *See, e.g., Deer Consumer Products, Inc.*, 2012 WL 5983641, at *20 (court found that statements about the plaintiff, who was subject to government investigation, other legal proceedings, and discussion by the media were not defamatory; the broader context in which the statements were made "require[d] the conclusion that the challenged statements be treated as an expression of the writer's views and opinions"); *Cummins v. Suntrust Capital Mkts., Inc.*, 649 F. Supp. 2d 224, 234–35 (S.D.N.Y. 2009) (protected expression of opinion where defendant issued report accusing executives of stock option abuses and stating that, "[a]t the end of the day, shareholders will have to decide whether this management team and its board of directors have fulfilled their fiduciary duty. We are currently hard pressed to reach such a conclusion"), *aff'd*, 416 F. App'x 101 (2d Cir. 2011).

Furthermore, the Complaint fails to plead sufficient facts demonstrating that Fichthorn acted with actual malice. Actual malice is the standard because MiMedx is a public company and the subject matter of the discussion was a matter of public interest – an investigation and lawsuit involving claims of channel stuffing and other wrongdoing by MiMedx. Under applicable law, "a public-figure plaintiff must plead 'plausible grounds' to infer actual malice by alleging 'enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of' actual malice." *Biro v. Conde Nast*, 807 F.3d 541, 546 (2d Cir. 2015) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)); *see also Adelson v. Harris*, 973 F. Supp. 2d 467, 503 (S.D.N.Y. 2013) ("[T]he pleading standards under *Iqbal* and *Twombly* require courts to dismiss defamation actions where the allegations in the complaint do not plausibly suggest actual malice"). Moreover, because actual malice is a measure of the defendant's attitude toward the truth, not his attitude toward the plaintiff, allegations of a defendant's bias or "hostility fail plausibly to establish . . . actual malice." *Egiazaryan v. Zalmayev*, No. 11-cv-2670 (PKC), 2011 WL 6097136, at *8 (S.D.N.Y. Dec. 7, 2011).

MiMedx contends that it has plausibly pleaded actual malice by alleging that Fichthorn should have known the company was blameless because its leaders had told him so. Specifically, MiMedx points to conversations between Fichthorn and company representatives in which they asserted that sending products to customers who did not order them was a legal "consignment" rather than improper channel-stuffing. (*See* Compl. ¶¶ 29-30; Doc. No. 46, Opp. at 20-21.) But allegations that a speaker knew of a plaintiff's denials of wrongdoing are insufficient to establish actual malice because any other rule would allow public figures to stifle criticism merely by denying accusations. As the Second Circuit has explained, "such denials are so commonplace . . . that, in themselves, they hardly alert the conscientious [speaker] to the likelihood of error." *Edwards v. Nat'l Audubon Soc'y, Inc.*, 556 F.2d 113, 121 (2d Cir. 1977). Indeed, that Fichthorn talked to MiMedx management before making his comments shows precisely the opposite of malice – that he considered its position before stating his views about the import of the former employees' allegations. *See Cabello-Rondón v. Dow Jones & Co.*, No. 16-cv-3346 (KBF), 2017 WL 3531551, at *10 (S.D.N.Y. Aug. 16, 2017) (attempts to interview plaintiff and his supporters negated any inference of purposeful avoidance of the truth). Fichthorn was free to evaluate information he received from various sources when relaying his views and information about MiMedx to the shareholder, and his knowledge of MiMedx's denial of misconduct therefore does not establish malice. *See St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (to show reckless conduct, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication").

Thus, the defamation and slander claims against Fichthorn and BR Dialectic must be dismissed because the alleged statements made by Fichthorn were protected opinion and because MiMedx has failed to sufficiently plead actual malice. Because it is clear that dismissal is warranted on these grounds, the Court does not address Fichthorn and BR Dialectic's other arguments for dismissal of these claims.

B. False Light

The parties dispute whether New York or Georgia law applies to MiMedx's false light claim.[3] The Court does not address the choice of law issue because the claim fails under both states' laws.

New York does not recognize a tort for placing someone in a false light. *Cruz v. Latin News Impacto Newspaper*, 216 A.D.2d 50, 51 (1st Dep't 1995). So, the claim clearly fails under New York law.

To the extent Georgia law applies, this privacy-based cause of action is not viable when the subject matter of the communication is a matter of a public investigation or public interest. *Cox Commc'ns v. Lowe*, 328 S.E.2d 384, 385 (Ga. Ct. App. 1985). MiMedx is a public company that was facing an SEC investigation and lawsuit. It therefore has no privacy interest in the subject matter discussed, *i.e.*, the allegations of channel stuffing, between Fichthorn and the

[3] The parties cite to New York law for the defamation and tortious interference claims and do not contest application of New York law. With respect to the defamation claims, they agree there is no material difference between Georgia and New York law. With respect to tortious interference with business relations, the Court notes that Georgia law both includes and expands upon the elements required to state such a claim under New York law. *Compare 16 Casa Duse, LLC v. Merkin*, 791 F.3d 247, 261 (2d Cir. 2015) *with Metro Atlanta Task Force for the Homeless, Inc. v. Ichthus Cmty. Trust*, 780 S.E.2d 311 (Ga. 2015). Because the Court concludes, as detailed below, that no claim for tortious interference has been stated under New York law, it follows that no such claim has been stated under Georgia's more stringent law. Therefore, the Court applies only New York law to these claims.

shareholder. *Id.* at 385; *see also* Restatement (Second) of Torts § 652I, cmt. C (1977) ("A corporation, partnership or unincorporated association has no personal right of privacy."). Georgia courts reject false light claims premised on statements about business entities, even when brought by the individual business owners, because they do not involve personal privacy. *See, e.g.*, *Jaillett v. Ga. Television Co.*, 520 S.E.2d 721, 727 (Ga. Ct. App. 1999) (affirming dismissal of plaintiff's false light claim: because the "broadcast related solely to the operation of [plaintiff's] business," it "did not violate [plaintiff's] right to be let alone"); *S&W Seafoods Co. v. Jacor Broad. of Atlanta*, 390 S.E.2d 228, 231-32 (Ga. Ct. App. 1989) (same).

Additionally, because Fichthorn only made his comments to one person, MiMedx cannot satisfy the publicity element of the tort. *Simpson v. Certegy Check Servs., Inc.*, 513 F. App'x 843, 845-46 (11th Cir. 2013) (under Georgia law, no false light claim based on statement made to one person); *Ass'n Servs., Inc. v. Smith*, 549 S.E.2d 454, 459 (Ga. Ct. App. 2001). Here, there was no publicity regarding the communication between Fichthorn and the shareholder. Rather, the communication was a private conversation between two investors. The conversation would never have become public but for MiMedx raising it in this lawsuit.

Moreover, the law is clear that a false light claim cannot be premised on statements that are constitutionally privileged as opinions. *See, e.g.*, *Pierce v. Warner Bros Entm't, Inc.*, 237 F. Supp. 3d 1375, 1380-81 (M.D. Ga. 2017). MiMedx cannot evade First Amendment protections for speech by dressing up its slander and defamation claims as other torts such as false light. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51-56 (1988) (plaintiff cannot evade First Amendment restrictions on defamation claim by pleading another tort); *Farah v.*

Esquire Magazine, 736 F.3d 528, 540 (D.C. Cir. 2013) (First Amendment barred claims for false light and tortious interference based on defendants' non-defamatory speech).

The cases on which MiMedx relies to resist dismissal are distinguishable. In *Dubinsky v. United Airlines Master Exec. Council*, 708 N.E.2d 441 (Ill. App. Ct. 1999), an Illinois court determined that false accusations of criminal conduct could be highly offensive to a reasonable person where two *individuals*, as opposed to a public company, were the target of such false accusations. Similarly, in *Fanelle v. LoJack Corp.*, 79 F. Supp. 2d 558, 563 (E.D. Pa. 2000), an individual plaintiff was "falsely labeled a criminal," and in *White v. Manchester Enter., Inc.*, 871 F. Supp. 934, 938 (E.D. Ky. 1994), an individual plaintiff was falsely characterized as having "been jailed in Florida for fraud," among other things. Moreover, the plaintiffs in all of these cases adequately pleaded the element of actual malice, which, as discussed *supra*, MiMedx has failed to do.

Thus, the false light claim must be dismissed against Fichthorn and BR Dialectic.

C. Tortious Interference With Business Relations

To make out a claim for tortious interference with business relations, a plaintiff must show that he had business relations with a third party, that the defendant intentionally interfered with those business relations for a wrongful purpose or by using dishonest, unfair or improper means, and that the defendant's acts injured the relationship. *Mi-Kyung Cho v. Young Bin Café*, 42 F. Supp.3d 495, 509 (S.D.N.Y. 2013). It is well established that a defendant has not employed "wrongful means" when acting with a permissible purpose such as normal, economic self-interest. *16 Casa Duse*, 791 F.3d at 262 (citing *Carvel Corp. v. Noonan*, 818 N.E.2d 1100, 1103 (N.Y. 2004)). Additionally, "[g]eneral allegations of interference with relationships with stockholders, investors, and financiers, and the absence of any allegation of a specific relationship, are fatal to the tortious interference with business relations claim." *Deer Consumer Products, Inc.*, 2012 WL 5983641, at *3.

The only relationship with which Fichthorn and BR Dialectic are alleged to have interfered is with a single shareholder of MiMedx. The fact that this shareholder subsequently sold his stock in MiMedx is insufficient to state a claim for tortious interference with a business relationship. As the court recognized in *Deer Consumer*, there must be evidence of a more specific contract or business relationship apart from stock ownership to sustain a claim. *Id.* Nor are there facts that support an inference that Fichthorn was motivated solely by malice or to inflict harm on MiMedx by unlawful means beyond self-interest or other economic considerations. Thus, this claim also must be dismissed as against Fichthorn and BR Dialectic. *See Monex Fin. Servs., Ltd. v. Dynamic Currency Conversion, Inc.*, 878 N.Y.S.2d 432, 433 (2d Dep't 2009).

The cases MiMedx cites in support of its claim are inapposite. In *Rebecca Broadway Ltd. P'ship v. Hotton*, 143 A.D.3d 71, 77 (1st Dep't 2016), the record contained evidence that a defendant had injured the plaintiff's business relationship "either through the use of wrongful means" – specifically, the use of confidential information – "or with the sole purpose of inflicting harm on [the plaintiff]." In *Advanced Marine Techs., Inc. v. Burnham Sec., Inc.*, 16 F. Supp. 2d 375, 385 (S.D.N.Y. 1998), as in this case, the plaintiff failed to demonstrate that the defendant "intentionally caused the [third party] not to enter into" a business relationship with the plaintiff, and the tortious interference cause of action was accordingly dismissed. Finally, in *Balance Point Divorce Funding, LLC v. Scrantom*, 978 F. Supp. 2d 341, 352 (S.D.N.Y. 2013), which MiMedx cites solely for the proposition that tortious interference claims can arise in the context of investor relationships, the plaintiff had alleged the existence of a specific business relationship – namely, its funding negotiations with the relevant third party.

MiMedx cites no case in which urging a stockholder of a publicly traded company to sell his shares to new owners was held to constitute tortious interference to the business, which would essentially claim interference between the business and itself. Moreover, it is commonplace that investment advisors discuss negative news about public companies that may impact the stock price. Sophisticated investors can accept or reject what they hear from investment advisors. Permitting tortious interference claims in this context would turn Wall Street norms on their head. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51-56 (1988) (plaintiff cannot evade First Amendment restrictions on defamation claim by pleading another tort); *Farah v. Esquire Magazine*, 736 F.3d 528, 540 (D.C. Cir. 2013) (First Amendment barred claims for false light and tortious interference based on defendants' non-defamatory speech).

Thus, the tortious interference claim against Fichthorn and BR Dialectic also must be dismissed.

3. Plaintiffs' Request For Expedited Discovery As To Identity Of Viceroy

MiMedx asserts claims of libel and defamation, false light, and tortious interference with business relations against Viceroy. Plaintiff McCormack asserts claims of libel and defamation against Viceroy. The represented Defendants have suggested that MiMedx's claims against Viceroy fail as a matter of law.[4] None argue that McCormack's claims against Viceroy fail as a matter of law. To the extent that Viceroy published statements suggesting that McCormack engaged in illegal activity at his prior employer, McCormack may be able to make out a claim of libel *per se*. *See* footnote 1 *supra*.[5] Viceroy, however, is not represented. And, Plaintiff McCormack does not know the identity of Viceroy.

A Court may order early or expedited discovery upon a showing of good cause. Fed. R. Civ. P. 26(d); *Digital Sin, Inc. v. Does 1-176*, 279 F.R.D. 239, 241 (S.D.N.Y. 2012). Discovery to determine the identity of John Doe defendants has been found appropriate. *adMarketplace, Inc. v. Tee Support, Inc*., No. 13-cv-5635 (LGS), 2013 WL 4838854, at *2 (S.D.N.Y. Sept. 11, 2013) (granting expedited discovery to identify defendant in a defamation case); *see also Arista Records, LLC v. Doe 3*, 604 F.3d 110 (2d Cir. 2010); *Malibu Media, LLC v. John Does 1-11*, No. 12-cv-3810 (ER), 2013 WL 3732839 (S.D.N.Y. 2013) (same); *John Wiley & Sons, Inc. v. Doe Nos. 1-30*, 284 F.R.D. 185, 189 (S.D.N.Y. 2012) (same). Because identifying the Defendant Viceroy by name is necessary for Plaintiffs to advance their asserted claims, and because Plaintiff McCormack may very well be able to make out a claim of defamation *per se* (and no Defendant has argued otherwise), Plaintiffs have established good cause for some discovery.[6]

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[4] For the reasons set forth above, MiMedx's claims against Viceroy may not survive a motion to dismiss filed by Viceroy. This Court does not, however, make any finding or recommendations with respect to the appropriateness of dismissal of the claims by MiMedx against Viceroy because Viceroy has not been served and has not filed a motion to dismiss.

[5] This Court does not make any finding or recommendations with respect to the appropriateness of the dismissal of the claims by McCormack against Viceroy because Viceroy has not been served and has not filed a motion to dismiss.

[6] This Court acknowledges that courts have denied pre-answer discovery in which a party sought to learn the true identity of Aurelius Value for the type of speech that MiMedx asserts was improper, but those cases involved alleged defamation of a public company, not a private individual. *See Aurelius v. BofI Fed. Bank*, No. MC 16-71 DSF (FFM), 2016 WL 8925145, at *6 (C.D. Cal. Sept. 20, 2016) ("BofI has not made the showing necessary to overcome

However, the discovery Plaintiffs seek from Sparrow, Fichthorn and BR Dialectic is improper and likely won't lead to the information Plaintiffs seek. All of the represented Defendants who have made appearances in this matter have disclaimed knowledge of the information Plaintiffs seek and provided affidavits to that effect. Instead, this Court will permit Plaintiff McCormack to serve a third-party subpoena pursuant to Federal Rule of Civil Procedure 45 on the Internet Service Provider associated with Viceroy's Internet Protocol (IP) address, as the Court is unaware of a viable alternative means of obtaining information sufficient to serve process on Viceroy. *See Malibu Media*, No. 15-cv-4743, 2015 WL 5013874, at *1 (S.D.N.Y. Aug. 18, 2015). To protect the subscriber associated with the relevant Viceroy IP address from harassment or unnecessary embarrassment, the limited discovery being permitted is subject to the following conditions:

- The subpoena may seek defendant Viceroy's name and address only. Plaintiff shall not seek defendant's email address or telephone number by subpoena or otherwise.
- Plaintiff may use Viceroy's name and address for the purpose of this litigation only. Plaintiff shall not disclose, or threaten to disclose, defendant's name, address, or any other identifying information (other than defendant's IP address) that Plaintiff may subsequently learn.
- Defendant Viceroy, once identified, will be permitted to litigate this case anonymously unless and until this Court orders otherwise, after Defendant has had notice of and an opportunity to challenge the proposed disclosure. Therefore, Plaintiff shall not publicly file any of defendant Viceroy's identifying information, beyond his or her IP address, and must file all documents containing such identifying information under seal.
- Plaintiff shall serve a copy of this Order upon the ISP along with the subpoena.
- Within 60 days of the date of service of the Rule 45 subpoena upon it, and at least 60 days before providing any responsive information to plaintiff, the ISP

Aurelius's right to anonymity as preserved by the First Amendment to the United States Constitution."); Transcript, *BofI Fed. Bank v. Seeking Alpha, Inc.*, No. 1:16-MC-00025 (S.D.N.Y. Mar. 14, 2016), Dkt. 27 (granting motion to quash subpoena seeking identity of Aurelius Value).

shall serve Defendant Viceroy with a copy of the subpoena and a copy of this Order. The ISP may serve Defendant Viceroy using any reasonable means, including written notice sent to his or her last known address, transmitted by first class mail or overnight service.

- Defendant Viceroy shall have 60 days from the date of service of the Rule 45 subpoena and this Order upon him or her to file any motions contesting the subpoena (including a motion to quash or modify the subpoena), as well as any request to litigate the subpoena anonymously. The ISP may not turn over the identifying information of Defendant Viceroy to Plaintiff McCormack before the expiration of this 60-day period. Additionally, if Defendant Viceroy or the ISP files a motion to quash or modify the subpoena, or a request to litigate the subpoena anonymously, the ISP may not turn over any responsive information to Plaintiff McCormack until the issues have been addressed and the Court issues an order.
- The ISP shall preserve any subpoenaed information pending the resolution of any timely-filed motion to quash.
- The ISP shall confer with Plaintiff McCormack and shall not assess any charge in advance of providing the information requested in the subpoena. If the ISP receives a subpoena and elects to charge for the cost of production, it shall provide a billing summary and cost report to Plaintiff McCormack.

CONCLUSION

For the reasons set forth above, this Court recommends that Sparrow's Motion to Dismiss (Docket No. 33) be GRANTED and Sparrow dismissed as a Defendant in this matter; that Fichthorn and BR Dialectic's Motion to Dismiss (Docket No. 38) be GRANTED and that these Defendants be dismissed from this matter. This Court recommends that the Motion for Expedited Discovery (Docket No. 14) be GRANTED IN PART AND DENIED IN PART.

SO ORDERED.

Dated: January 12, 2018
New York, New York

Katharine H Parker

KATHARINE H. PARKER
United States Magistrate Judge

NOTICE

The parties shall have fourteen days from the service of this Report and Recommendation to file written objections to the Report and Recommendation, pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure. *See also* Fed. R. Civ. P. 6(a), (d) (adding three additional days only when service is made under Fed. R. Civ. P. 5(b)(2)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to by the parties)).

If any party files written objections to this Report and Recommendation, the opposing party may respond to the objections within fourteen days after being served with a copy. Fed. R. Civ. P. 72(b)(2). Such objections shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Paul G. Gardephe at the United States Courthouse, 500 Pearl Street, New York, New York 10007, and to any opposing parties. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b). Any requests for an extension of time for filing objections must be addressed to Judge Gardephe. The failure to file these timely objections will result in a waiver of those objections for purposes of appeal. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b); *Thomas v. Arn*, 474 U.S. 140 (1985).